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No. 01-1067

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

WHITE MOUNTAIN APACHE TRIBE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The Tribe acknowledges that the 1960 Act expressly reserved to the government the "right" to use Fort Apache for its own purposes "for as long as" it deems such use necessary, and that the 1960 Act contains no provision imposing a duty on the Secretary of the Interior to manage the property for the benefit of the Tribe while it is being used for government purposes. See Resp. Br. 11, 34, 38; Pet. App. 14a-15a. The Tribe nonetheless argues that the Act both imposes such a duty and confers on the Tribe a substantive right to recover money damages against the government for alleged mismanagement of the property while the government is still exercising its reserved right. As explained below, that argument is contradicted by the terms of the 1960 Act, this Court's Tucker Act

decisions, and bedrock sovereign immunity principles. It should be rejected by this Court.

A. A Substantive Right To Recover Money Damages Under The Tucker Act Must Be Specifically Conferred By Congress

The Tribe acknowledges (at 12) that the 1960 Act is "silen[t] about money damages," but argues that it is entitled to damages based on considerations drawn from secondary considerations that it seeks to read into the Act. That mode of analysis is out of step with this Court's precedents. This Court has firmly rejected the notion that the Tucker Act "waives sovereign immunity with respect to any claim invoking a constitutional provision or a federal statute or regulation." *United States* v. *Testan*, 424 U.S. 392, 400 (1976) (emphasis added). Rather, under the Tucker Act and this Court's decisions, the United States is immune from a suit for money damages based on any claim founded on an Act of Congress, unless the Act "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States* v. *Mitchell*, 463 U.S. 206, 218 (1983) (*Mitchell II*); see U.S. Br. 14-20.

Moreover, the "grant of a right of action [for money damages] must be made with *specificity*." *Testan*, 424 U.S. at 400 (emphasis added); accord *Army & Air Force Exch. Serv.* v. *Sheehan*, 456 U.S. 728, 739-740 (1982) (Under the Tucker Act, "jurisdiction over respondent's complaint cannot be premised on the asserted violation of regulations that do not *specifically* authorize awards of money damages.") (emphasis added). In that regard, the analysis applied in determining whether an Act of Congress creates a substantive right to damages that is enforceable under the Tucker Act squares with the analysis that the Court applies in determining whether

an Act of Congress creates a federal right that is privately enforceable under the general terms of 42 U.S.C. 1983. See U.S. Br. 17, 42-43; *Gonzaga Univ.* v. *Doe*, 122 S. Ct. 2268, 2275 (2002) (federal statute must contain "unambiguously conferred right" for suit to lie under Section 1983); *id.* at 2273 (federal statute must "confer[] entitlements sufficiently specific and definite to qualify as enforceable rights") (internal quotations omitted); *id.* at 2274 ("specific, individually enforceable rights").

B. The 1960 Act Does Not Create A Substantive Right To The Payment Of Compensation

1. The Tribe claims (at 43) that "[t]he 1960 Act provides the statutory basis for the Tribe's substantive right to the payment of money damages" in this case. But nothing in the 1960 Act confers any specific monetary entitlements, speaks in terms of money damages or claims, or indeed has any monetary character at all. See U.S. Br. 21-22. Instead, the Act simply declares property to be held "in trust" and, at the same time, reserves *to the government* the "right" to use that property for "administrative or school purposes for as long as they are needed for that purpose." Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8. As the Court of Federal Claims stated, "the plain language of the [1960] Act reserves the Fort Apache site for the *federal government's* benefit and not for the benefit of the Tribe." Pet. App. 48a (emphasis added); see U.S. Br. 25.[1]

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[1] The government is still exercising its reserved right under the 1960 Act. Through the Bureau of Indian Affairs, the Department of the Interior (Department) operates the Theodore Roosevelt Indian School at Fort Apache. According to the Department, during the 2001-2002 school year, 113 students were enrolled at the school, 50 of whom lived in dormitories on the site. The total

The Tribe claims (at 3) that "[t]he trust property is a valuable economic asset for the Tribe," stating that "[t]he Tribe has plans to use the property * * * for tourism development, as Fort Apache has become an increasingly significant tourist attraction." In fact, the Tribe's damages claim in this case is based entirely on a 1998 report commissioned by the Tribe (and appended to the complaint), detailing the costs necessary to refurbish Fort Apache in accordance with the Secretary's Standards for the Treatment of Historic Properties and Guidelines for Preserving, Rehabilitating, Restoring, and Reconstructing Historic Buildings (codified in part at 36 C.F.R. Pt. 68).[2] But there is no evidence that Congress had tourism or any other economic development of the property in mind when it

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budget for the school for the 2000-2001 year, including program funds, operations and maintenance, and administrative costs, was approximately $2 million. In addition to those funds, the Department reports that from 1987 to 2001, it allocated more than $3.4 million for repair and renovation projects at the school.

[2] The Secretary's "standards for historic buildings" (Resp. Br. 4) apply only to "proposed grant-in-aid development projects assisted through the National Historic Preservation Fund." 36 C.F.R. 68.1. As the Tribe has acknowledged, such standards "are procedural in nature and do not affirmatively mandate preservation of historic buildings or other resources." Pet. App. 53a n.9. Moreover, although the Tribe argued below that its damages claim was authorized by federal historic-preservation laws, that argument was properly rejected by both courts, see *id.* at 8a-10a, 48a-49a, and in this Court the Tribe relies solely on the 1960 Act. The Tribe claims (at 4 n.8) that it "is seeking money damages to repair, not 'rebuild' Fort Apache," but the 1998 report on which it bases its damages claim refutes that contention. From recommending, *inter alia*, that the Fort's stables be "rebuilt" (Compl. App. A at 131-1) to proposing that the Bearded Irises along Officers' Row be "replaced" (*id.* at L-3), the 1998 report is a complete manual for the restoration of Fort Apache.

enacted the 1960 Act. To the contrary, the Act was passed to deal more formally with the title to Fort Apache in the wake of the military's departure from the post, and to afford the government "flexibility" to continue to use the property for its own purposes, just as it had before. S. Rep. No. 671, 86th Cong., 1st Sess. 4 (1959) (Resp. Lodging L-11); see U.S. Br. 27 n.11.[3]

2. According to the Tribe (at 44), the Act's conveyance of property "in 'trust' to the Tribe, includes by implication, a remedy for breach of trust." See Resp. Br. 10 ("The express trust created by Congress * * * necessarily includes an implied remedy for breach of trust."); *id.* at 36 (same). That is incorrect.

In *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), this Court rejected the argument, urged by the dissenting Justices in that case, that the statute at issue there—the General Allotment Act—could fairly be interpreted as mandating compensation because it "explicitly creates a 'trust.'" *Id.* at 547 (White, J., joined by Brennan and Stevens, JJ., dissenting); see U.S. Br. 23-24. The trust relationship created by the 1960 Act is even more limited than the one in *Mitchell I* and, thus, *a fortiori*, does not authorize damages for breach of trust. The General Allotment Act required the United States to hold the property in *Mitchell I* "in trust for the sole use and benefit of the Indian [allottees]." 445 U.S. at 541 (quoting 25 U.S.C. 348). Here, by contrast, although the 1960 Act declares that

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[3] Fort Apache was already well more than a half-century old in 1960. Yet far from indicating that Congress intended to assume liability for the sort of repair and restoration damages at issue, the House Report accompanying the 1960 Act states that the statute's "[e]nactment * * * will entail no expenditure by the Government." H.R. Rep. No. 1284, 86th Cong., 2d Sess. 2 (1960) (Resp. Lodging L-26).

the property is held "in trust," it is not held for the "sole and exclusive benefit of the Indian[s]." Rather, as even the Tribe acknowledges (at 38), "the Secretary unquestionably has a reserved right in the 1960 Act to use the * * * trust property" for *government* purposes. Accord Resp. Br. 34.

In *Mitchell II*, this Court reiterated that, although the General Allotment Act at issue in *Mitchell I* "provided that the United States would hold land 'in trust' for Indian allottees," that Act "create[d] only a limited trust relationship." 463 U.S. at 217. The Court further explained that "[t]he trust language of the [General Allotment] Act does not impose any fiduciary management duties or render the United States answerable for breach thereof." *Id.* at 217-218. So too here. Indeed, the Tribe acknowledges (at 11) that the 1960 Act is "silen[t]" not only with respect to any right to money damages or compensation, but also with respect to any underlying substantive "maintenance and protection duties" for the benefit of the Tribe. See U.S. Br. 26-27; Pet. App. 19a ("It is undisputed that the 1960 Act does not explicitly define the government's obligations."). The absence of any such express duties for the benefit of the Tribe is all the more telling in light of the fact that the 1960 Act explicitly reserves to the government the right to use the trust property for its own purposes for as long as it deems such use necessary.

In *Mitchell II*, which involved a set of statutes and regulations different than the General Allotment Act, the Court concluded that the United States could be held accountable in damages for the breaches of trust alleged in that case. In reaching that conclusion, however, the Court did not rely on the simple fact that the United States held property "in trust" for the Indian plaintiffs; rather, in finding a substantive right to

compensation, the Court emphasized that "the statutes and regulations at issue * * * *clearly establish* fiduciary obligations of the Government in the management and operation of Indian lands and resources," and that the provisions in turn could "fairly be interpreted as mandating compensation by the Federal Government for damages sustained." 463 U.S. at 226 (emphasis added); see U.S. Br. 19-20 & n.8, 26-28. The 1960 Act here, like the General Allotment Act in *Mitchell I*, does not even mention, much less "clearly establish," any fiduciary obligations that conceivably could in turn give rise to a right to compensation for a violation.[4]

3. In trying to make up for "[t]he 1960 Act's silence about money damages" (Resp. Br. 12), the Tribe argues that recognizing a "money damage remedy" in this case would be "consistent with this Court's 'well-settled' rule that 'where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available

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[4] This Court's refusal to give Congress's use of the words "in trust" the sort of talismanic significance urged by the Tribe is well-founded not only as a matter of the bedrock sovereign-immunity principles underlying the Tucker Act, but as a matter of trust law. For one thing, "[t]here are a number of widely varying relationships which more or less closely resemble trusts, but which are not trusts, although the term 'trust' is sometimes used loosely to cover such relationships." Restatement (Second) of Trusts § 4, Introductory Note at 15 (1959) (Restatement of Trusts). So too, even when a trust is created, any number of powers or duties can be reserved or modified with respect to the "administration of the trust." *Id.* § 37; see also *id.* § 176, comment d. Thus, even the Restatement, on which the Tribe relies, supports the conclusion that, in construing an Act of Congress that places property "in trust," a court should look to the specific obligations prescribed by Congress, rather than simply the general label used by Congress to characterize a relationship.

remedy to make good the wrong done.'" *Ibid.* (quoting *Barnes* v. *Gorman*, 122 S. Ct. 2097, 2102 (2002)). That rule, however, applies in the context of implied private rights of action against individuals, not to suits against the United States itself. Cf. *FDIC* v. *Meyer*, 510 U.S. 471, 481-484 (1994).

In *Testan*, this Court specifically rejected the argument that "where there has been a violation of a substantive right, the Tucker Act waives sovereign immunity as to all measures necessary to redress that violation." 424 U.S. at 400. As the Court explained: "In a suit against the United States, there cannot be a right to money damages without a waiver of sovereign immunity, and we regard as unsound the argument * * * that all substantive rights of necessity create a waiver of sovereign immunity such that money damages are available to redress their violation." *Id.* at 400-401. Rather, "the asserted entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation'" for a violation. *Id.* at 400; accord *Mitchell II*, 463 U.S. at 216-217. Nothing in the 1960 Act supports such an interpretation.[5]

[5] The Tribe claims (at 11) that the government's interpretation of the 1960 Act "results in a patently absurd and unjust consequence." See Resp. Br. 26. That is incorrect. It simply results in the conclusion that the United States has not waived its sovereign immunity from suit for money damages in this context. See *United States* v. *Shaw*, 309 U.S. 495, 501 (1940) ("The reasons for this immunity are imbedded in our legal philosophy."). "Not every claim invoking the Constitution, a federal statute, or a regulation is cognizable under the Tucker Act." *Mitchell II*, 463 U.S. at 216. In any event, as the Court of Federal Claims and Chief Judge Mayer explained, the remedy for alleged waste traditionally available to the holder of a contingent interest in property, such as the Tribe here, is an injunction, not damages. See Pet. App. 34a-36a, 53a-55a; note 8, *infra*. In *Mitchell II*, this Court concluded that the availability of "prospective equitable remedies" was "inadequate" because it believed that "the Indian allottees are in no position to monitor * * * their lands on a consistent basis." 463 U.S. at 227; see *ibid.* ("Many [allottees] are poorly educated, most are absentee owners, and many do not even know the exact physical location of their allotments."). The Tribe here, however, has for decades actively monitored the situation at Fort Apache. Resp. Br. 3.

C. There Is No Basis To Imply A Right To Recover Damages From The United States That Is Not Specified By Congress

1. The Tribe argues broadly that the Indian Tucker Act (28 U.S.C. 1505) authorizes Indian plaintiffs to recover money damages as long as they are "based upon an alleged breach of a fiduciary obligation that arises under the Constitution, laws, treaties of the United States or Executive Orders of the President." Resp. Br. 16-17; see *id.* at 13-18. In particular, the Tribe rejects (at 17) the suggestion that "Indian Tucker Act claims [are] 'the same' as non-Indian Tucker Act claims." But in the *Mitchell* decisions, the Court made clear that the Indian Tucker Act entitles Indian plaintiffs to the *same* rights and remedies in suits against the United States as non-Indians, not the sort of special status that the Tribe seeks here. See *Mitchell I*, 445 U.S. at 539-540; *Mitchell II*, 463 U.S. at 212 n.8; U.S. Br. 40-41. As the Court explained, the Indian Tucker Act "no more confers a substantive right against the United States to recover money damages than does [the Tucker Act]." *Mitchell I*, 445 U.S. at 540.[6]

[6] The Tribe argues (at 13) that the statements of then-Representative Jackson, the sponsor of the bill that became the Indian Tucker Act, support the conclusion that "[w]hen Congress enacted the 1946 Indian Claims Commission Act, it expressly presumed and intended that future claims filed by Tribes under Section 24 would or could be based on the Government's trust mismanage-

In effect, the Tribe argues that, under the Indian Tucker Act, *any* law that might be said to create some form of trust relationship with an Indian Tribe authorizes the recovery of money damages against the United States for a breach of that relationship. As discussed above, however, that argument is directly contradicted by *Mitchell I*, in which the Court refused to conclude that the express trust relationship created by the General Allotment Act was itself sufficient to authorize the recovery of breach-of-trust damages under the Tucker Act or Indian Tucker Act. So too, in *Mitchell II*, the Court emphasized that "[n]ot every claim" for damages invoking an Act of Congress is cognizable under the Tucker Act or Indian Tucker Act. 463 U.S. at 216. Instead, "the claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Id.* at 216-217. That is just as true for the tribal plaintiff here as it was for the Indian plaintiffs in the *Mitchell* litigation.

Moreover, if adopted by this Court, the Tribe's far-reaching interpretation of the Indian Tucker Act would transform the Court of Claims into a court of equity for Indian plaintiffs, in which jurisdiction would invariably

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ment or breach of its fiduciary obligations to Indian Tribes." In *Mitchell I*, however, this Court rejected the same argument. See 445 U.S. at 540 n.2 ("Contrary to respondents' assertions, the comments of then-Representative Jackson * * * do *not* indicate that Congress intended [the Indian Tucker Act] to be a waiver of sovereign immunity for any alleged breach of trust accruing after August 13, 1946. Indeed, Representative Jackson stated that 'the bill provides that with respect to all grievances that may arise hereafter Indians shall be treated *on the same basis* as other citizens of the United States in suits before the Court of Claims.'") (quoting 92 Cong. Rec. 5313 (1946)) (emphasis added).

be present to adjudicate damages claims brought by "an Indian Tribe, band or group" for breach of any alleged fiduciary obligation that could be traced to the "Constitution, laws or treaties of the United States, or Executive orders of the President." 28 U.S.C. 1505. When Congress enacted the Indian Tucker Act, it directed the Indian Claims Commission to "'hear and determine' such claims against the United States based on legal and equitable principles and on considerations of 'fair and honorable dealings.'" *Mitchell I*, 445 U.S. at 540 n.2. But it did so only with respect to "claims arising *before* August 13, 1946." *Ibid.* (emphasis added). All claims arising after that date, including the claim here, must be adjudicated in accordance with established Tucker Act principles discussed above.

2. The Tribe argues (at 30, 31) that the existence of "control by the Government over Indian property" provides an "independent basis" for establishing a fiduciary duty that, if breached, would support a claim for damages. See Resp. Br. 9 ("[T]he existence *vel non* of an enforceable trust-fiduciary relationship is inferred by courts from the nature of the transaction or activity involved, that is, whether the Government in the case at hand has taken on, supervised managed *or* controlled Indian monies or properties."); *id.* at 10-11, 39-40, 42-44. That argument also fails. See U.S. Br. 29-33.

In *Mitchell II*, the Court did note that the government exercised "elaborate control over forests and property belonging to Indians." 463 U.S. at 225. But in that case, the applicable statutes and implementing regulations vested the Secretary with control over the property that was to be exercised *for the benefit of the Indians*. In this case, by contrast, the 1960 Act vests the Secretary with control of the property *for the benefit of the government*. See Pet. App. 14a-15a ("It is

undisputed that the 1960 Act contains no * * * requirement" for "the United States to manage the trust corpus for the benefit of the beneficiaries, *i.e.*, the Native Americans.").

Moreover, even in *Mitchell II*, the Court did not base its determination that damages were available on the sort of "control alone" test fashioned by the court of appeals, Pet. App. 15a, and advanced by the Tribe here. Rather, the Court looked to whether the statutory and regulatory provisions on which the Indian plaintiffs based their claims imposed specific duties, and whether those provisions could in turn "fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties *they* impose." 463 U.S. at 219 (emphasis added); see *id.* at 228. That is, the Court considered control not in a *factual* sense, but rather in the *legal* sense of specific "fiduciary management duties" (*id.* at 218) that were rooted in the express terms of the statutes and implementing regulations at issue. See *id.* at 224-225. It is "undisputed" (Pet. App. 19a) that the 1960 Act does not spell out any such duties. See also Resp. Br. 11 (acknowledging that the 1960 Act is "silen[t]" with respect to "maintenance and protection duties").

For these reasons, the bare trust created by the 1960 Act is far removed from the sort of "comprehensive" regulatory scheme at issue in *Mitchell II*, which—with marked specificity—"addressed virtually every aspect of forest management." 463 U.S. at 220, 222; see *id.* at 219-223. And, as discussed, whereas the statutes in *Mitchell II* explicitly obligated the government to manage Indian timber resources in light of "'the needs and *best interests of the Indian[s],*'" *id.* at 222 (quoting 25 U.S.C. 406(a)) (emphasis added), the 1960 Act imposes no such obligation and, indeed, expressly

authorizes the government to use the trust property for its own purposes.

3. The Tribe argues that a damages remedy may be supplied by "look[ing] to the common law of trusts, *as modified by* the statutory or other source of the substantive right giving rise to a Tribe's breach of trust claim." Resp. Br. 36 (emphasis added); see also *id.* at 12. That analysis would turn the established Tucker Act inquiry on its head. As this Court explained in *Mitchell II*, "for claims against the United States 'founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department,' a court must inquire whether *the source of substantive law* can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." 463 U.S. at 218 (emphasis added; citation omitted). Particularly where, as here, the "source of substantive law" does not impose any affirmative duties for the benefit of the Indians at all, much less create a right to money damages, there is no basis for a court to turn to unanchored, judge-made principles of common law to supply such a remedy. See U.S. Br. 33-35.[7]

The United States' power concerning Indians and Indian resources is fundamentally different in terms of its origin and nature than that of a simple common-law trustee, with respect to both the beneficiaries of the trust and the trust res. Accordingly, this Court has

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[7] In addition to raising serious separation of powers concerns (see U.S. Br. 42-43), subjecting the United States to damages based on reference to the common law "would 'rende[r] superfluous' 'many of the federal statutes * * * that expressly provide money damages as a remedy against the United States in carefully limited circumstances." *Sheehan*, 456 U.S. at 740.

recognized that the federal government performs a role in its relations with the Indian Tribes that is different from that of a simple private trustee governed by common law standards. See, *e.g.*, *Nevada* v. *United States*, 463 U.S. 110, 127-128 (1983). Moreover, the common law itself drew a distinction between private trustees and public trustees, particularly with respect to remedies. See 2 A. Scott, *The Law of Trusts* § 95, at 17 (4th ed. 1987) ("At common law it was held that a use or trust could not be enforced against the Crown."); Restatement of Trusts § 95. Particularly when it comes to duties that may be enforceable through a damages remedy, any attempt to redefine the federal trust relationship with respect to Indian Tribes or tribal resources must be accomplished through the legislative process, and not judicial imposition of duties drawn from the common law that were fashioned and have long been applied with an entirely different set of considerations in mind. "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001).[8]

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[8] That is especially true where, as here, it is, at the very least, debatable what rule the common law would supply in a case between private parties. The courts below split over whether even the common law would afford the Tribe a damages remedy for the alleged mismanagement in this case. Compare Pet. App. 26a-31a & n.15, with *id.* at 34a-36a, 52a-55a. Under the Restatement (First) of Property § 188 (1936) (Restatement of Property), the holder of a contingent interest in an estate occupied by another "cannot recover damages immediately payable to himself for any act or omission of the owner of the estate for life." As Chief Judge Mayer explained, the Tribe's interest in the property here is contingent, in that the 1960 Act authorizes the government to use the property "for as long as" it deems necessary, even in perpetuity. Pet. App. 35a. The United States' interest is therefore fundamentally different than a life estate, which is certain to end in a foreseeable period. At the same time, even assuming violation of some common law duty applicable to a private trustee, there would be no reason to allow the Tribe to recover damages today for the restoration of property that the government is entitled to use in perpetuity, and no basis to require the government to relinquish its right to use the property for its own purposes by allowing the Tribe to come on the property and restore it as *it* sees fit, *i.e.*, "for tourism development" (Resp. Br. 3), such as by rebuilding the cavalry's stables at the Old West Fort. Nor would there be any basis to infer a duty to maintain the property for any purposes other than the government purposes specified in the Act, particularly when the costs attendant to such an implied duty could greatly exceed the value of the property for the specified government purposes. Cf. Restatement of Property § 139.

The Tribe claims (at 10) that, because the 1960 Act "expressly created a 'trust,' [the Act] need not explicitly authorize a suit for damages for breach of trust any more than a contract between the United States and a private entity must explicitly authorize a suit for damages for breach of contract." See Resp. Br. 37 n.48. But quite unlike claims based on any alleged breach of trust, the Tucker Act explicitly consents to suit with respect to claims based on "any express or implied contract with the United States." 28 U.S.C. 1491(a)(1). Thus, unlike a plaintiff who sues the United States for breach of contract, a plaintiff who sues the United States for breach of trust must point to some source of positive law (an Act of Congress or implementing regulation) that itself creates not merely a specific substantive right, but a substantive right that "can fairly be interpreted as mandating compensation" if violated. *Mitchell II*, 463 U.S. at 216-217; see U.S. Br. 40 n.16.[9]

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[9] Both the Tribe (at 41-42) and amicus National Congress of American Indians (NCAI) (at 5, 15 n.7) rely on *United States* v.

Amicus NCAI argues that the 1960 Act should be interpreted "as including the *implied* duty 'to surrender the premises *at the expiration of [the] term* in as good a condition as when they were taken, ordinary wear and tear and damages from the elements excepted.'" NCAI Br. 16 (quoting *Dehn* v. *S. Brand Coal & Oil Co.*, 63 N.W.2d 6, 11 (Minn. 1954)) (emphasis added). As discussed above, there is no basis for grounding a damages claim brought under the Tucker Act on such an implied duty. But even if such an implied duty could provide the basis for a damages claim under the Tucker Act, it would not support the damages claim here. This action was brought *before* the government has even relinquished its right to use the property for its own purposes "for as long as" it deems necessary. See also note 8, *supra*.

4. Finally, the Tribe argues (at 28) that a damages remedy should be available in this case in light of the "general trust relationship between the United States and the Indian Tribes." See Resp. Br. 9, 17-18, 41; see also NCAI Br. 18-21. But the federal government's

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Bostwick, 94 U.S. 53 (1876), in arguing that the common law supplies a damages action against the United States for alleged waste. But *Bostwick* involved an action for breach of contract, not breach of trust. *Id.* at 65. Whatever authority *Bostwick* establishes with respect to the obligations that the United States assumes when it enters into a real estate lease, it does not support the claim for damages in this case based on the 1960 Act. Nor does it support the argument that this Court is free to read into that Act of Congress implied covenants or duties that are not found in or supported by the text of the Act. In any event, even if a breach-of-trust action were analogous to a breach-of-contract action under the Tucker Act, *Bostwick* would be distinguishable based on the express reservation in the 1960 Act of the government's "right" to use the property at issue for its own purposes "for as long as" it determines necessary.

special relationship with the Indian Tribes—which may in a general sense be described as one of guardianship or trust—does not automatically create legally enforceable duties on the part of the United States, much less a substantive right to recover damages against the United States for any alleged breach of such duties. See U.S. Br. 40-42. To the contrary, in determining whether the United States may be liable to an Indian plaintiff on a claim founded on an Act of Congress or implementing regulation, this Court applies the same principles under the Tucker Act governing whether the United States is liable for damages in other contexts. See *Mitchell II*, 463 U.S. at 218-219.[10]

Amicus NCAI traces the government's special relationship with the Indian Tribes through various decisions of this Court and back as far as the Northwest Ordinance of 1787. See NCAI Br. 19-21. But while there is no question that the United States has long enjoyed a unique relationship with the Indian Tribes, and that certain undertakings go along with that relationship, it is equally well-settled that the United States historically has enjoyed sovereign immunity from suit by an Indian Tribe for money damages for alleged breach of trust, except when Congress has waived such immunity. And "even for Indian plaintiffs, '[a] waiver of sovereign immunity "cannot be lightly im-

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[10] In *United States* v. *Cherokee Nation*, 480 U.S. 700, 707 (1987), this Court observed in a similar vein that, while "[i]t is, of course, well-established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity," that fiduciary relationship does not "create property rights where none would otherwise exist." So too here, the general relationship of guardianship or trust does not entitle an Indian Tribe to bring a damages action against the United States that is not otherwise actionable under the Tucker Act.

plied but must be unequivocally expressed."'" *United States* v. *Mottaz*, 476 U.S. 834, 851 (1986) (quoting *Mitchell I*, 445 U.S. at 538, and *United States* v. *King*, 395 U.S. 1, 4 (1969)). For most of the Nation's history, Congress passed "special jurisdictional Acts" waiving the United States' immunity from such claims. *Mitchell II*, 463 U.S. at 214. The Indian Tucker Act eliminates the need for such individualized jurisdictional acts. But to proceed under the Indian Tucker Act, an Indian plaintiff must still point to a source of positive law that imposes specific duties on the United States and provides for the payment of compensation by the United States if those duties are not performed. See *Mitchell II*, 463 U.S. at 216-217.

Because the 1960 Act does not impose any specific management duties on the federal government for the benefit of the Tribe, or confer a substantive right to recover money from the United States, this Court should reject the Tribe's and NCAI's invitation to create such a right simply "because it might be thought that [it] should be responsive to a particular conception of enlightened governmental policy." *Testan*, 424 U.S. at 400; see *Shaw*, 309 U.S. at 502 ("It is not our right to extend the waiver of sovereign immunity more broadly than has been directed by the Congress.").[11]

[11] For the reasons given in the government's opening brief, the decisions of this Court on which the Tribe and NCAI rely in pointing to the United States' general fiduciary relationship with respect to Indian Tribes or tribal property do not support implying a right to recover damages here. See U.S. Br. 35 & n.13 (discussing *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001); *Seminole Nation* v. *United States*, 316 U.S. 286 (1942); *United States* v. *Mason*, 412 U.S. 391 (1973)). In addition, the damages claim in *United States* v. *Cherokee Nation*, *supra*, was authorized by an Act of Congress that specifically "conferr[ed] jurisdiction on the United States District Court for the Eastern District of Oklahoma to determine 'any claim which the Cherokee Nation of Oklahoma may have against the United States for any and all damages to Cherokee tribal assets related to and arising from the construction of the [project at issue]." 480 U.S. at 702. And *Nevada* v. *United States*, 463 U.S. at 113, involved a water-rights action between the United States and a State.

D. The Tribe Is Not Remediless For The Violation Of Any Substantive Duty That The Secretary May Have With Respect To The Trust Property

Here, as in other cases in which this Court has refused to find that the United States is accountable in money damages in the absence of the requisite statutory foundation, "the situation * * * is not that Congress has left the [plaintiff] remediless, * * * but that Congress has not made available * * * the remedy of money damages." *Testan*, 424 U.S. at 403.

The Tribe could have attempted in an appropriate court to obtain an injunction or other equitable relief for violation of any substantive duty that it believed was created by the 1960 Act (or by any other statute). See 28 U.S.C. 1331, 1361, 1362; 5 U.S.C. 701 *et seq.*[12] To be sure, in the government's view, such an action based on the 1960 Act would fail on the merits in light of the government's reserved "right" under the 1960 Act to use the property at issue "for as long as" it sees fit (as well as other defenses). But an action for equitable relief would not face the sovereign immunity bar that precludes the Tribe's damages claim in this case. See 5 U.S.C. 702 (authorizing certain actions against the

[12] The Court of Federal Claims concluded that it lacked jurisdiction to enter injunctive relief. Pet. App. 54a. The court of appeals did not address that ruling, and the Tribe has not sought review of it in this Court.

United States "seeking relief other than money damages").

In addition, to the extent that the federal government appropriates an Indian Tribe's property without just compensation, in violation of the Fifth Amendment, a Tribe may bring a claim for compensation under the Tucker Act. See, *e.g.*, *United States* v. *Creek Nation*, 295 U.S. 103 (1935); *Jacobs* v. *United States*, 290 U.S. 13 (1933).[13] But although it discusses the nature of its interest in the property at length, the Tribe has not brought a takings claim; rather, its only claim in this case is for breach of trust. Because the 1960 Act—the only source of substantive law on which the Tribe relies in this Court—does not mandate payment of compensation by the federal government for that alleged breach of trust, the Tribe's suit was properly dismissed by the Court of Federal Claims.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

OCTOBER 2002

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[13] Both *Pueblo of Santa Ana* v. *United States*, 214 F.3d 1338, 1342 (Fed. Cir. 2000), and *United States* v. *Shoshone Tribe of Indians*, 304 U.S. 111, 112 (1938), on which the Tribe now relies (see Resp. Br. 25-26, 33), involved claims for just compensation under the Fifth Amendment for alleged appropriation of trust property by the United States. See also *id.* at 34 n.45 (citing Fifth Amendment cases).